IN THE

Supreme Court of the United States

No. 693

ESTHER FRANK

Petitioner

vs.

FREDERICK LEVY JR. LIBERTY NATIONAL BANK AND TRUST COMPANY OF LOUISVILLE KENTUCKY As Executor of the Estate of Maude B Levy Deceased and ADELAIDE S MILLER

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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STATUTES AND RULES INVOLVED

Section 1391, Title 28, U.S.C.A., reads as follows:

"(a) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law."

Federal Rules of Civil Procedure:

"Rule 82. Jurisdiction and Venue Unaffected. These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein. (As amended Dec. 29, 1948, eff. Oct. 20, 1949.)"

Section 107, Title 11, U.S.C.A.:

"(e) For the purpose of any recovery or avoidance under this section, where plenary proceedings are necessary, any State court which would have had jurisdiction if bankruptcy had not intervened and any court of bankruptcy shall have concurrent jurisdiction."

Section 110, Title 11, U.S.C.A.:

"(e)(3) For the purpose of such recovery or of the avoidance of such transfer or obligation, where plenary proceedings are necessary, any State court which would have had jurisdiction if bankruptcy had not intervened and any court of bankruptcy shall have concurrent jurisdiction."

Section 46, Title 11, U.S.C.A., reads as follows:

"§46. Jurisdiction of controversies between receivers and trustees and adverse claimants

(a) The United States district courts shall have jurisdiction of all controversies at law and in equity, as distinguished from pproceedings under this title,

between receivers and trustees as such and adverse claimants, concerning the property acquired or claimed by the receivers or trustees, in the same manner and to the same extent as though such proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

(b) Suits by the receiver and the trustee shall be brought or prosecuted only in the courts where the bankrupt might have brought or prosecuted them if proceedings under this title had not been instituted, unless by consent of the defendant, except as provided in sections 96, 107, and 110 of this title."

Section 1406, Title 28, reads as follows:

"§ 1406. Cure or waiver of defects

(a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

(b) Nothing in this chapter shall impair the jurisdiction of a district court of any matter involving a party who does not interpose timely and sufficient objection to the venue. June 25, 1948, c. 646, § 1, 62 Stat. 937; May 24, 1949, c. 139, § 81, 63 Stat. 101."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No..

ESTHER FRANK,

Petitioner,

vs.

FREDERICK LEVY, JR., LIBERTY NATIONAL BANK AND TRUST COMPANY OF LOUISVILLE, KENTUCKY, As Executor of the Estate of Maude B. Levy, Deceased, and ADELAIDE S. MILLER,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To The Honorable, The Chief Justices and Associate Justices of the Supreme Court of the United States:

Your petitioner, Esther Frank, respectfully prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINION OF THE COURT BELOW

The judgment and opinion of the United States Court of Appeals for the Seventh Circuit are appended to this petition and appear in the certified record. The original opinion issued October 16, 1961, and an order denying a petition for rehearing was entered on December 4, 1961. The Opinion of the Court of Appeals is reported at 295 F. 2d 580, sub. nom. *Yorke, Trustee et al. v. Frank et al.*

The judgment of the United States District Court for the Northern District of Illinois, Eastern Division, which was appealed from, consisted of an order dismissing the petitioner, Esther Frank, as a defendant in an action brought by Nathan Yorke, Trustee in Bankruptcy of Abraham M. Liebling, Bankrupt, against Esther Frank, Fay Liebling, Eleanor Becker, individually and as Trustee under Trust Agreement dated October 14, 1956, Steven Schuham and Anthony Schuham. On the petition of Frederick Levy, Jr., and other creditors to vacate the District Court's order, the District Judge adhered to his decision dismissing Esther Frank but issued a certificate that a substantial question existed, and the petition for leave to appeal was granted by the Seventh Circuit Court of Appeals. The Seventh Circuit Court of Appeals reversed the District Judge and remanded the cause to the District Court with the direction that the order dismissing Esther Frank be vacated.

Esther Frank, the petitioner, is a married woman who resides with her husband and family in Palm Springs, California. Her dismissal in the District Court was based upon Section 1391, Title 28, U.S.C.A., providing that where jurisdiction is not founded solely on diversity of citizenship, a civil action may be brought only in the judicial district where all defendants reside, except as otherwise provided by law. The other defendants in the suit brought by the Trustee in Bankruptcy resided in Chicago, Illinois.

JURISDICTION.

The order of the United States Court of Appeals for the Seventh Circuit reversing the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, was filed on October 16, 1961. A petition for rehearing was denied on December 4, 1961. (These orders appear in the Appendix hereto). This petition is filed within 90 days of the denial of the petition for rehearing by the Seventh Circuit Court of Appeals. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED.

1. Is it proper to construe the Bankruptcy Act as modifying Section 1391, Title 28, U.S.C.A., to permit a Trustee in Bankruptcy to sue a resident of California in Illinois despite the fact that jurisdiction is not based by the plaintiff solely on diversity of citizenship and the defendants are not all residents of the same district?

2. Does not the opinion, presented for review, in effect authorize a Bankruptcy Trustee to maintain a plenary action in any jurisdiction of his choice, without limitation?

3. Can an unsupported and unsworn claim of fraud by a plaintiff be considered as a claim to property or the assertion of ownership of a proprietory interest sufficient to support a contention that the suit is a local action to recover property?

STATEMENT OF THE CASE.

The suit from which the appeal below arose is a plenary action brought by Nathan Yorke, Trustee in Bankruptcy of Abraham M. Liebling, Bankrupt, against the petitioner, Esther Frank, and co-defendants Fay Liebling, Eleanor Becker, individually and as Trustee under a Trust Agreement dated October 14, 1956, Steven Schuham and Anthony Schuham. Fay Liebling is the wife of the Bankrupt and Esther Frank and Eleanor Becker are his daughters, and Steven Schuham and Anthony Schuham are his grandchildren.

Originally a Complaint on behalf of the Trustee was based upon diversity, and service was obtained upon Esther Frank, a resident of Palm Springs, California, while she was visiting her parents in Chicago.

This original Complaint was abandoned in favor of an "Amended Complaint in Chancery." This Amended Complaint does not rely upon diversity of citizenship but as its jurisdictional statement recites provisions of the Bankruptcy Act.

A motion to dismiss for lack of venue was filed by the defendant, Esther Frank, based upon Section 1391 of Title 28, U.S.C.A., which provides as follows:

> "(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law."

The motion indicated that the Amended Complaint in Chancery alleged Esther Frank as a resident of California, and the other defendants as residents of Illinois.

The District Court sustained the motion to dismiss for lack of venue. The Trustee did not appeal. However, creditors petitioned to vacate the order and appealed from the denial of that motion, the trial Court granting a certificate of the existence of a substantial question. The Court of Appeals below granted a petition for leave to appeal and reversed the District Court.

The Amended Complaint in Chancery is not supported by affidavit, but alleges upon information and belief, that Abraham Liebling, the Bankrupt, had conducted business in the names of members of his family, who are made defendants, and prays an accounting by the defendants for money or property received from the Bankrupt.

The Amended Complaint in broad and general language, and based only upon information and belief, makes general reference to various properties and assets without specifically indicating the location of the assets claimed to have been fraudulently transferred.

The Court of Appeals based its decision upon *Collett v. Adams*, 249 U.S. 545, a suit to set aside a voidable preference with regard to specific real estate located in the district where the action was brought. The Court of Appeals closed its opinion by stating that it did not consider it necessary to determine whether the action was a local one.

REASONS FOR GRANTING THE WRIT

This Honorable Court should exercise its jurisdiction in this case for the following reasons:

1. The Court of Appeals below has sanctioned a course of conduct which is contrary to the usual and appropriate standards for the administration of justice in the District Courts of the United States, with regard to an important question of venue in civil suits by Bankruptcy Trustees.

2. The Court of Appeals below has misinterpreted a decision of the Supreme Court in a manner which will authorize Bankruptcy Trustees to file actions in any Federal Court or jurisdiction of choice, without regard for venue. The decision of this Court involved is *Collett* v. *Adams*, 249 U.S. 545.

It is respectfully submitted that the Court of Appeals, although specifically disclaiming any determination that the action was a local action, could only have sustained its position if, indeed, the action is a local action.

Examination of the Amended Complaint does not specify any particular property located in the Northern District of Illinois which would justify a finding that the action is one to enforce a right or claim to property.

In this respect the decision of the District Court of Puerto Rico in *Grapette Co., Inc.* v. *Grapette Bottling Co., et al.*, 102 F. Supp. 517, is appropriate and distinguishes a local action from a mere stated claim to property unsupported by oath or any substantial showing of the establishment of a direct claim or lien upon any property of the defendant.

The claimed reliance upon the affidavit of Edward Lev, one of the attorneys for the creditors who brought the appeal, is not sound since examination of that affidavit (page 16 of appellees' Appendix) discloses that the testimony upon which it relies was on or prior to November 30, 1958, and did not show that it was properly related to the Amended Complaint filed March 16, 1960. The affidavit merely shows that Esther Frank, the petitioner, had a bank account and some stock transactions in Chicago 15 months prior to the filing of the action in the case at bar, and the relationships between the property mentioned in the affidavit of Lev and the subject matter of the Amended Complaint, is not made clear. Certainly there is nothing to indicate that her property mentioned in the affidavit belongs to the Bankrupt.

The petitioners believes that the law properly applicable to this case is expressed in the following cases:

Craig, Trustee in Bankruptcy v. Tannenbaum, et al., 151 F. Supp. 725, demonstrates clearly the difference between venue and jurisdiction and the operation of Section 1406, Title 28, as follows:

> "(1, 2) Since the bankrupt was a New York corporation and the defendants are citizens of New York, diversity of citizenship is lacking despite the fact that the trustee is a citizen of New Jersey. *Shutel v. 14th Street & Broadway Realty Corporation*, 2 Cir., 1931, 48 F. 2d 1041. Consequently, jurisdiction must be predicated solely upon Section 70, sub. e of the Bankruptcy Act. Although this court has jurisdiction to entertain the action, there remains for consideration the question of venue. 'Where * * * the action is not local, as where the trustee seeks a simple money judgment * * * for payments of money made in fraud of creditors, the general venue section 1391, requiring suit to be brought in the defendant's district would

seem to be clearly applicable.' 4 Collier on Bankruptcy, 14 Ed., p. 478.

"In the instant case, it appears that all of the defendants reside in the Eastern District of New York. Therefore, the suit is hereby transferred to said district in accordance with Title 28 U.S.C.A., § 1406(a)."

Gorovitz, et al. v. *Balkin, et al.*, 96 F. Supp. 747, at page 750 contains the following:

"Plaintiff (trustee) is seeking here to exercise the alleged right of Hollywood (bankrupt) to rescission of a contract to which it is a party, and can bring it only in a court where Hollywood might have brought it. Bankruptcy Act, § 23, sub. b, 11 U.S.C.A. § 46, sub. b."

The petitioner respectfully claims that the Trustee should litigate his claim against her in the State of her residence, it not appearing that the action is one *in rem* for property located in the Northern District of Illinois where the Trustee brought the suit.

The following decisions interpret *Collett* v. *Adams*, 249 U.S. 545, 39 S. Ct. 372, 63 L. Ed. 764, relied upon by the Court below:

Coffey v. *Managed Properties, Inc., et al.*, 85 F. 2d 88, 91,

"The decision in *Collet* v. *Adams*, 249 U.S. 545, 39 S.Ct. 372, 63 L.Ed. 764, is not *contra*. There the court merely held that the suit, which was to set aside a preferential transfer of land, was local in nature and would, therefore, lie in the court of the district where the property was situated, also that the defendant, though residing in another district, might, under the provisions of section 54 of the Judicial Code, be reached by original process sent to and served in the district of his residence. The court did

not, however, intimate that the suit could not be brought elsewhere."

Taubel-Scott-Kitzmiller Co. v. Fox, 264 U.S. 433, 68 L.Ed. 774,

"Wherever the bankruptcy court had possession, it could, under the act of 1898, as originally enacted, and can now, determine in a summary proceeding controversies involving substantial adverse claims of title under subdivision c of § 67, under subdivision b of § 60, and under subdivision c of § 70. But in no case where it lacked possession could the bankruptcy court, under the law as originally enacted, nor can it now (without consent) adjudicate in a summary proceeding the validity of a substantial adverse claim. In the absence of possession, there was, under the Bankruptcy Act of 1898, as originally passed, no jurisdiction, without consent, to adjudicate the controversy even by a plenary suit. The Act of February 5, 1903, chap. 487, § 8, 32 Stat. at L. 797, 798, 800, together with the Act of June 25, 1910, chap. 412, § 7, 36 Stat. at L. 838, 840, Comp. Stat. § 9607, 1 Fed. Stat. Anno. 2d ed. p. 761, conferred upon the bankruptcy court jurisdiction, under certain circumstances, against the adverse claimant; in a plenary suit under § 60, subdivision b, § 67, subdivision c, and § 70, subdivision e. But no amendment has conferred upon the bankruptcy court jurisdiction, even in a plenary suit, of proceedings under subdivision f of § 67."

Austrian, et al. v. Williams, et al., 159 F. 2d 67, 70,

"We turn now to a consideration of § 23, from which both parties assert they derive support. As construed together with § 2, sub. a(7), this section determines the jurisdiction of the district courts over civil actions brought by bank

ruptcy trustees appointed to liquidate estates under Chapters I to VII. In such ordinary bankruptcy proceedings a trustee can bring suit against an adverse claimant in a district court only if the defendant consents to the suit, or if the bankrupt himself could have brought the suit had the bankruptcy petition not been filed. *Bardes v. Hawarden First Nat. Bank, supra; Schumacher v. Beeler, supra; Gins v. Mauser Plumbing Supply Co.*, 2 Cir., 148 F. 2d 974. "If jurisdiction is claimed on the ground of diversity of citizenship, for example, the citizenship of the bankrupt, and not the citizenship of the trustee, is decisive. *Stiefel v. 14th St. & Broadway Realty Corp.*, 2 Cir., 48 F. 2d 1041."

Morris Schoenthal and Fannie R. Schoenthal, Petitioners, v. Irving Trust Company, as Trustee in Bankruptcy of Leonard H. Smith, 287 U.S. 92-97, L.Ed. 185-189.

"Suits to recover preferences constitute no part of the proceedings in bankruptcy but concern controversies arising out of it. *Taylor v. Voss*, 271 U.S. 176, 182, 70 L.Ed. 889, 892, 46 S. Ct. 461, 7 Am. Bankr. Rep. (N.S.) 706. They may be brought in the state courts as well as in the bankruptcy courts. *Collett v. Adams*, 249 U.S. 545, 549, 63 L.Ed. 764, 767, 39 S. Ct. 372. The question whether remedy must be by action at law or may be pursued in equity notwithstanding objection by defendant depends upon the facts stated in the bill. And, in absence of a clear showing that a court of law lacks capacity to give the relief which the allegations show plaintiff entitled to have, a suit in equity cannot be maintained. *Boyce v. Grundy*, 3 Pet. 210, 215, 7 L.Ed. 655, 657; *Bussard v. Houston*, 119 U.S. 347, 352, 30 L.Ed. 451, 453, 7 S. Ct. 249; *United States v. Butte Root Development Co.*, 200 U.S. 451, 472, 56 L.Ed. 550, 560, 26 S. Ct. 318."

CONCLUSION.

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

MAURICE J. WALSH
Attorney for Petitioner,
Esther Frank.

APPENDIX.

OPINION

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1961 SEPTEMBER SESSION, 1961

No. 13261.

NATHAN YORKE, Trustee in Bankruptcy of ABRAHAM M. LIEBLING, Bankrupt,
and
FREDERICK LEVY, JR., *et al.*,
Plaintiffs-Appellants,
v.
ESTHER FRANK, FAY LIEBLING, ELEANOR BECKER, individually and as Trustee under Trust Agreement dated October 14, 1956, STEVEN SCHUHAM and ANTHONY SCHUHAM,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

October 16, 1961

Before DUFFY and CASTLE, *Circuit Judges*, and MERCER, *District Judge*.

CASTLE, *Circuit Judge*. This appeal is taken from an order of the District Court of the Northern District of Illinois dismissing for lack of venue one of the defendants

to a plenary action brought by the Trustee in Bankruptcy and is here pursuant to leave to appeal granted by this Court.

On October 29, 1958, the Trustee in Bankruptcy of Abraham M. Liebling commenced a plenary action against Esther Frank, daughter of the bankrupt, by filing his complaint in the District Court. The complaint alleged that the bankrupt began in 1942 to transact business in the name of his wife and daughter in order to defraud his creditors. The complaint sought, among other things, to compel the defendant to account for all the property taken in her name pursuant to the alleged fraudulent scheme, and that such conveyances and transfers of property as were found unlawful be set aside and the property turned over to the trustee for the benefit of creditors.

Federal jurisdiction of the trustee's cause of action was based on the diversity of citizenship existing by reason of the Illinois citizenship of the trustee and California citizenship of Esther Frank. On March 13, 1961 the trustee filed an amended complaint joining several additional defendants who were citizens of Illinois and as a consequence abandoned as a basis of federal jurisdiction the original parties diversity of citizenship and proceeded instead against all defendants by virtue of Section 70 of the Bankruptcy Act of 1938, as amended, 11 U.S.C.A. §110, and other relevant provisions of said Act.

The defendant Frank moved to dismiss the amended complaint on the ground of improper venue. The District Court dismissed Esther Frank as a defendant. The District Court granted appellants leave to petition for rehearing of the order in their status of creditors, the Court having ascertained that the trustee did not intend to seek a rehearing of such order or appeal therefrom.

After briefs and arguments, and submission of an affidavit listing property of Esther Frank located in the Northern District of Illinois, Eastern Division, the District Court adhered to its prior ruling and dismissed Esther Frank as a defendant but modified the order to provide that the:

> "within order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order may materially advance the ultimate termination of the litigation."

This Court later granted appellants leave to appeal.

It is contended by the appellants that the District Court erred in ruling that the venue statute applicable generally to civil actions commenced in the Federal Courts requires the dismissal of a non-Illinois defendant in an action brought in Illinois by a Trustee in Bankruptcy under §70 of the Bankruptcy Act to recover property located within the District of suit. The appellant also contends that the amended complaint was properly filed in the Northern District of Illinois for the additional reasons that the cause of action stated is a local one within the meaning of title 28 U.S.C.A. §1655 and sets forth a claim to property within the District.

The general venue statute (28 U.S.C.A. §1391) provides in paragraph (b) as follows:

> "(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, *except as otherwise provided by law*." (Emphasis added.)

The Bankruptcy Act does "otherwise provide." In §23 (11 U.S.C.A. §46) it is provided:

> "(b) Suits by the receiver and the trustee shall be brought or prosecuted only in the courts where the bankrupt might have brought or prosecuted them if proceedings under this Act had not been instituted, unless by consent of the defendant, *except as provided in Sections 60, 67, and 70* of this Act." (Emphasis added.)

Therefore actions brought under §70 of the Act are excepted from the rule that suits by a trustee may be brought or prosecuted only in the courts where the bankrupt might have brought or prosecuted them. It is provided in §70(e)(3)[1] that:

The question therefore is whether §70(e)(3) relates to and governs the venue of actions brought pursuant thereto as well as the jurisdiction thereof. There was no question below concerning the power of the district court to act on the pleadings before it. The question is whether the District Court must look to the general venue statute (28 U.S.C.A. §1391) to determine the place of exercise of its admitted statutory jurisdiction. The courts have held that the general venue statute is not applicable to a trustee's suit under §70. The venue of such actions is governed, in all cases except for suits for monies only, by the location of the property (real or personal) which is the subject matter of the suit. *Collett v. Adams*, 249

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[1] 11 U.S.C.A. §110

> "(3) For the purpose of such recovery or of the avoidance of such transfer or obligation, where plenary proceedings are necessary, any State court which would have had jurisdiction if bankruptcy had not intervened and any court of bankruptcy shall have concurrent jurisdiction."

U.S. 545 (1919); *Rodgers v. Bankers Commercial Co.*, 42 F. 2d 506 (N.D. Ill., 1930); *Detroit Trust Co. v. Ford Motor Co.*, 13 F. 2d 942 (E.D. Mich., 1926).

In *Colbett v. Adams* the trustee sought under §60b of the Act:

> (1) to set aside a voidable preference of real property located in the district of suit
>
> (2) to recover the said real property or the value thereof, and
>
> (3) an accounting as to the proceeds of personalty which had been disposed of by the defendant.

There was no diversity of citizenship between the parties. In reversing the trial court's dismissal on jurisdictional grounds the Supreme Court ruled that the general venue statute was inapplicable and stated:

> "The court below is a court of bankruptcy and the property in question is within its territorial limits, so the jurisdiction under the terms of the Bankruptcy Act is plain. The suit is a local one in the sense of §54 of the Judicial Code and this enabled the court to reach the defendant, who resides in another district in the same state, by original process sent to and served in the district of his residence. Such a suit, apart from the terms of the Bankruptcy Act, is excepted by §51 of the Code from the general provision that a defendant may not be sued in any district other than that of which he is an inhabitant."

The exception to prior section 51 relates to the predecessor of the present venue statute applicable generally to actions in the federal courts.

That §23 of the Bankruptcy Act (11 U.S.C.A. §46) relates to venue is implicit in its use of the provision "unless

by consent of defendant". Venue may be founded on consent but "jurisdiction" of subject matter may not.

The present suit therefore is by the terms of section 70 of the bankruptcy code expressly excepted from the requirement otherwise imposed by §1391 that such a suit shall not be brought unless in the district of which the defendant is an inhabitant.

We conclude that the district court should have overruled the objections urged against venue. We do not deem it necessary to pass on the question whether the amended complaint was properly filed in the Northern District of Illinois because of the additional contention that the cause of action stated is a local one within the meaning of 28 U.S.C.A. §1655.

The cause is remanded with directions that the District Court vacate its order dismissing Esther Frank.

REMANDED WITH DIRECTIONS TO VACATE ORDER.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

ORDER REVERSING JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago 10, Illinois

Monday, October 16, 1961
BEFORE
HON. F. RYAN DUFFY, *Circuit Judge*
HON. LATHAM CASTLE, *Circuit Judge*
HON. FREDERICK O. MERCER, *District Judge*

NATHAN YORKE, Trustee in Bankruptcy of Abraham M. Liebling, Bankrupt, and
FREDERICK LEVY, JR., *et al.*,
Plaintiffs-Appellants,
vs.
ESTHER FRANK, FAY LIEBLING, ELEANOR BECKER, individually and as Trustee under Trust Agreement dated October 14, 1956, Steven Schulman and Anthony Schulman,
Defendants-Appellees.

No. 13261

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that this cause be, and it is hereby, REMANDED to the said District Court with directions that the District Court vacate its order dismissing Esther Frank, in accordance with the opinion of this Court filed this day.

It is further ordered and adjudged by this Court that the costs on this appeal be taxed in favor of plaintiffs-appellants Frederick Levy, Jr., *et al.*, and against defendant-appellee Esther Frank.

ORDER DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

Monday, December 4, 1961

BEFORE

HON. F. RYAN DUFFY, *Circuit Judge*

HON. LATHAM CASTLE, *Circuit Judge*

HON. FREDERICK O. MERCER, *District Judge*

NATHAN YORKE, Trustee in Bankruptcy of Abraham M. Liebling, Bankrupt,

Plaintiff.

No. 13261 vs.

ESTHER FRANK, *et al.*,

Defendants.

FREDERICK LEVY, JR., *et al.*,

Appellants.

No. 13261 vs.

ESTHER FRANK, *et al.*,

Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

IT IS ORDERED by the Court that the petition for rehearing filed by appellees herein be, and the same is hereby, DENIED.

CLERK'S CERTIFICATE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

I, KENNETH J. CARRICK, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing pages contain a true copy of the Appellant's Brief and Appendix, filed May 31, 1961; Opinion, filed October 16, 1961; Judgment, entered October 16, 1961; Order Denying Petition for Rehearing, entered December 4, 1961 in:

Cause No. 13261

FREDERICK LEVY, JR., *et al.*,

Appellants,

vs.

ESTHER FRANK, *et al.*,

Appellees,

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

IN TESTIMONY WHEREOF I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this eighth day of December A.D. 1961.

Kenneth J. Carrick
Clerk of the United States Court of Appeals for the Seventh Circuit.

(SEAL)